BRB No. 13-0489 BLA

WAYNE CONLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NATIONAL MINES CORPORATION	)	DATE ISSUED: 06/30/2014
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Rita Roppolo (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Acting Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2011-BLA-5668) of Administrative Law Judge John P. Sellers, III, rendered on a subsequent claim, filed

on April 12, 2010,[1] pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). The administrative law judge credited claimant with eighteen years of coal mine employment, based on the parties' stipulation. Because claimant established fifteen years of qualifying coal mine employment and a totally disabling respiratory impairment, the administrative law judge found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis under amended Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4). The administrative law judge further found that claimant established a change in an applicable condition of entitlement under 20 C.F.R. §725.309, and that employer did not rebut the amended Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that employer failed to rebut the amended Section 411(c)(4) presumption. Employer contends that the administrative law judge failed to consider all relevant evidence, mischaracterized the medical opinions he considered, mischaracterized the discussion in the preamble and substituted his opinion for that of the experts. Claimant has not responded. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer's arguments with respect to the preamble. Employer has filed a reply brief, challenging the Director's view of the preamble and reiterating its arguments.[3]

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[1] Claimant filed three prior claims for benefits, on May 21, 1990, July 17, 1996, and July 16, 2001, each of which was denied. Director's Exhibits 1, 2. The 2001 claim was denied by Administrative Law Judge Alan L. Bergstrom, in a Decision and Order issued on September 27, 2007, for failure to establish any element of entitlement. Director's Exhibit 2. Claimant took no action on the denial until filing the current subsequent claim. Although the administrative law judge indicated that claimant filed this subsequent claim on May 2, 2008, *see* Decision and Order at 2, the record reflects that it was filed on April 12, 2010. Director's Exhibit 3.

[2] Under amended Section 411(c)(4), claimant is entitled to a rebuttable presumption of total disability due to pneumoconiosis, if he establishes fifteen years of underground coal mine employment, or employment in conditions that are substantially similar to those of an underground mine, and also has a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010).

[3] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant established total disability at 20 C.F.R. §718.204(b)(2), a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c), and invocation

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Because claimant invoked the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4), the burden of proof shifted to employer to rebut the presumption by proving that claimant does not have either clinical or legal pneumoconiosis[5] or by establishing that his disability "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); *see* 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305); *Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, BLR (6th Cir. 2013); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011). In evaluating whether employer disproved the existence of legal pneumoconiosis, the administrative law judge noted that employer relied on the opinions of Drs. Rosenberg and Jarboe, each of whom opined that claimant suffers from chronic obstructive pulmonary disease (COPD) unrelated to coal dust exposure. Employer's Exhibits 1, 3, 9-11. Dr. Rosenberg attributed claimant's COPD to cigarette smoking, while Dr. Jarboe opined that it was due to a combination of cigarette smoking and bronchial asthma. *Id*. The administrative law judge discredited the opinions of Drs. Rosenberg and Jarboe because he found that they expressed views that were inconsistent with the position of the Department of Labor (DOL) in the preamble to the revised regulations. Decision and Order at 23-26. The administrative law judge further discounted the opinions of Drs. Rosenberg and Jarboe

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of the presumption at amended Section 411(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibit 4; *see* Decision and Order at 3; Hearing Transcript at 10. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

[5] Clinical pneumoconiosis consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201 (a)(1). Legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201 (a)(2).

because he found that neither physician adequately explained how they eliminated claimant's eighteen years of coal mine dust exposure as a contributing factor to claimant's respiratory disease and disability. *Id*. at 25-28. Thus, he found that employer failed to disprove that claimant has legal pneumoconiosis. *Id*. at 28. The administrative law judge also found that "[b]ecause the determination of the presence of legal pneumoconiosis and disability causation essentially overlap," employer failed to rebut the amended Section 411(c)(4) presumption by establishing that claimant's disability did not arise out of, or in connection with, coal mine employment. *Id*. at 29.

Employer contends that the administrative law judge mischaracterized the opinions of Drs. Rosenberg and Jarboe and erred in relying on the preamble as a basis for rejecting their explanations for opining that claimant's COPD is not related to coal dust exposure. Employer maintains that the administrative law judge improperly concluded that employer's physicians relied on statistics in reaching their conclusions. Employer also asserts that the administrative law judge did not give proper consideration to claimant's treatment records. Employer's arguments are rejected as without merit.

Contrary to employer's contention, the administrative law judge had discretion to consult the preamble as an authoritative statement of medical principles accepted by the DOL, and to consider the preamble to the revised regulations in assessing the credibility of the medical opinions. *See A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-210-11 (6th Cir. 2012); *J.O.* [*Obush*] *v. Helen Mining Co*., 24 BLR 1-117, 1-125-26 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008). The administrative law judge observed correctly that Drs. Rosenberg and Jarboe each eliminated coal mine dust exposure as a cause for claimant's disabling COPD, "based on their view that coal dust causes a parallel decline in both the FEV1 and FVC, thus preserving FEV/FVC ratio." Decision and Order at 23, 25-26; *see* Employer's Exhibits 1, 3. The administrative law judge noted correctly that Drs. Rosenberg and Jarboe believe that because claimant's pulmonary function studies show a disproportionate decrease in his FEV1 compared to his FVC, claimant's respiratory impairment is characteristic of smoking and is not caused by coal dust exposure. Employer's Exhibit 1, 3. The administrative law judge rationally concluded, however, that this view is contrary to the position of the DOL that coal mine dust can cause clinically significant obstructive lung disease, in the absence of clinical pneumoconiosis, as shown by reductions in the FEV1 and the FEV1/FVC ratio. *See* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002); Decision and Order at 23, 25-26. The administrative law judge also rationally found that, "Dr. Rosenberg does not persuasively explain why, even if the reduced ratio of FEV1/FVC is due to [claimant's] smoking, the reduction in [claimant's] FEV1 cannot still be the result of both smoking and coal dust

exposure, since the DOL has determined that 'smokers who mine have additive risk for developing significant obstruction."[6] Decision and Order at 23; *see Napier*, 301 F.3d at 713-14, 22 BLR at 2-547; *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR at 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149, 1-155 (1989) (en banc).

The administrative law judge also permissibly rejected Dr. Jarboe's opinion, based on his explanation that claimant was not exposed to significant levels of dust and his reliance on "information available in the medical literature regarding dust levels [experienced] by tipple workers." Decision and Order at 27; *see Napier*, 301 F.3d at 713-14, 22 BLR at 2-547. The administrative law judge noted correctly that Dr. Jarboe "presumed that the dust level to which [claimant] was very likely exposed fell "far below the level which is required to cause significant airflow obstruction." Decisoin and Order at 27. The administrative law judge observed, however, that claimant's *uncontradicted* testimony indicates that he was "exposed to a large volume of coal dust at the tipple . . . that actually exceed the amount of coal dust [claimant] had experienced as an underground coal miner in the ventilated shafts." *Id*. (emphasis added).

Additionally, we reject employer's assertion that the administrative law judge failed to properly analyze claimant's treatment records in considering whether employer rebutted the amended 411(c)(4) presumption. The administrative law judge indicated that he had reviewed the treatment records in rendering his findings, and permissibly decided to summarize only those portions of the records he considered to be relevant to rebuttal. Decision and Order at 8-9. The administrative law judge specifically discussed the relevant aspects of the treatment records in conjunction with Dr. Jarboe's opinion, noting that Dr. Jarboe "pointed to the treatment records which demonstrate that the Claimant has been hospitalized and treated for exacerbation of his underlying obstructive lung disease" due to his ongoing smoking habit. *Id*. at 27-28. The administrative law judge assigned little weight to Dr. Jarboe's opinion, noting that he did not explain why, "even if claimant experienced acute exacerbations of his underlying COPD due to smoking, this would necessarily exclude coal dust exposure as a cause of the underlying chronic condition." *Id*. Thus, we reject employer's assertion that the administrative law judge failed to consider all of the evidence relevant to whether claimant has legal pneumoconiosis and rebuttal of the amended Section 411(c)(4) presumption.

[6] The administrative law judge observed correctly that the Department of Labor recognizes that coal dust exposure can cause a reduction in the FEV1 and that all of claimant's FEV1 values were "substantially reduced." Decision and Order at 23; *see* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000).

We consider employer's arguments in this appeal to be a request that the Board reweigh the evidence, which we are not empowered to do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). The administrative law judge permissibly concluded that employer's physicians were not credible since they did not rule out a causal relationship between claimant's disabling COPD and his coal mine employment. *See Peabody Coal Co. v. Smith*, 127 F.3d 818, 21 BLR 2-181 (6th Cir. 1998); *Clark*, 12 BLR at 1-155. Because the administrative law judge acted within his discretion in rendering his credibility determinations, we affirm his finding that employer did not disprove the existence of legal pneumoconiosis and is unable to rebut the amended Section 411(c)(4) presumption under the first prong. *See Napier*, 301 F.3d at 713-14, 22 BLR at 2-547; *Stephens*, 298 F.3d at 522, 22 BLR at 2-512; *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-325 (6th Cir. 2002).

With respect to the second method of rebuttal, because employer failed to disprove the existence of legal pneumoconiosis, *i.e.*, that claimant's disabling COPD is not due to coal dust exposure, we affirm the administrative law judge's conclusion that employer also failed to rebut the amended Section 411(c)(4) presumption by establishing that claimant's respiratory disability did not arise out of, or in connection with, coal mine employment. *See Ogle*, 737 F.3d at 1071, BLR (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, BLR (6th Cir. 2013); *Toler v. E. Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). We, therefore, affirm the administrative law judge's award of benefits.

II. COMMENCEMENT DATE FOR BENEFITS

The administrative law judge determined that the medical evidence does not reflect the date upon which claimant became totally disabled due to pneumoconiosis and, therefore, benefits are payable from the month in which claimant filed his subsequent claim. 20 C.F.R. §725.503(b). We agree with employer that the administrative law judge erred in finding that claimant is entitled to benefits "payable beginning May 2008, the month in which the claim was filed." Decision and Order at 29. This subsequent claim was filed in April 2010, not in May 2008. Director's Exhibit 3. Therefore, we affirm the administrative law judge's determination that claimant is entitled to benefits as of the month in which claimant filed his subsequent claim, but we modify the date of entitlement in his order to reflect that benefits commence as of April 2010. 20 C.F.R. §725.503(b).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed, but modified to reflect that benefits commence as of April 2010.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge